

1 ANDRÉ BIROTTE JR.
United States Attorney
2 LEON W. WEIDMAN
Assistant United States Attorney
3 Chief, Civil Division
ERIKA JOHNSON-BROOKS
4 Assistant United States Attorney
California Bar Number: 210908
5 Federal Building, Suite 7516
300 North Los Angeles Street
6 Los Angeles, California 90012
Telephone: (213) 894-0474
7 Facsimile: (213) 894-7819
Erika.Johnson@usdoj.gov
8

9 Attorneys for Federal Defendant
United States of America

10 UNITED STATES DISTRICT COURT
11
12 CENTRAL DISTRICT OF CALIFORNIA

13 DEREK A. CAPOZZI,
14
15 Plaintiff,
16
17 v.
18 UNITED STATES OF AMERICA,
19
20 Defendant.

No. EDCV 10-00239 AHM (DTB)

21 **FEDERAL DEFENDANT'S APPLICATION FOR A PROTECTIVE ORDER AND IN**
22 **RESPONSE TO PLAINTIFF'S MOTION TO COMPEL**
23
24
25
26
27
28

1 **I. INTRODUCTION AND STATEMENT OF FACTS**

2 On August 6, 2012, Plaintiff Derek A. Capozzi ("Plaintiff")
3 filed a Motion For a Privilege Log and Motion for Court Order To
4 Compel The United States to Provide Discovery ("Motion")
5 requested in his discovery letters of June 15, 2012, June 19,
6 2012, and July 20, 2012.¹ In the Motion, Plaintiff requests any
7 and all documents including, but not limited to, notes, letters,
8 investigations, pictures, memorandums submitted by institution
9 staff, and witness interviews concerning the alleged assault on
10 Plaintiff which occurred at the United States Penitentiary
11 located in Victorville, California ("USP Victorville") on May 18,
12 2008; any and all incident and investigation reports prepared
13 regarding the alleged assault; any video surveillance from May
14 18, 2008 capturing the alleged assault; current post orders and
15 policies regarding monitoring of units and metal detectors; and
16 post orders and policies regarding monitoring of units and metal
17 detectors from May 18, 2008.

18 On July 20, 2012, Defendant provided Plaintiff with 1026
19 pages of discovery and objections to his requests one and two.²
20 Defendant requests that certain documents requested by Plaintiff
21 be protected as disclosure of these documents would impinge on
22 the privacy rights of inmates and could threaten the safety and
23 security of the inmates and the population at the Metropolitan
24

25 ¹Plaintiff did not comply with Central District Local Rule 37-1
26 before filing the Motion to Compel.

27 ²Defendant did not receive a discovery letter, dated July 20,
28 2012.

1 Detention Center-Los Angeles ("MDCLA"). This sensitive
2 information includes, but is not limited to, documents and notes,
3 which provide information about other inmates housed within the
4 federal prison system, and information regarding security
5 procedures in USP Victorville. Such information is not public
6 and sensitive, and must not be disseminated given that USP
7 Victorville is a correctional institution which houses high
8 security inmates.

9 **II. DOCUMENTS SUBJECT TO PROPOSED PROTECTED ORDER**

10 Defendant requests that the following documents be protected
11 pursuant to a Court Order:

12 a. Current Post Orders being provided in response to
13 Requests for Production of Documents No.10 (set one) and Nos. 3,
14 8, 9, 10, 11, 15, 16, 17 (set two).

15 b. Statistics from USP Victorville being provided in
16 response to Request for Production of documents Nos. 1, 2, 8, 9,
17 15, 16, 17 (set two).

18 c. Tort Claim File being provided in response to Request
19 for Production of documents Nos. 4, 5, 9, 15, 16, 17 (set two).

20 d. SIS file provided in response to Request for Production
21 of documents Nos. 3, 4, 6 (set one) and Nos. 4, 5, 6, 9, 10, 11,
22 12, 13, 14, 15, 16, 17 (set two).

23 Defendant further requests that the proposed protected
24 documents described above will only be provided to Plaintiff by a
25 Court Order which will include the following terms and
26 conditions:

27 a. Defendant will identify the documents that are being
28

1 provided subject to this protective order;

2 b. The protected documents shall be maintained by
3 Plaintiff in accordance with this Order, and shall be used by
4 Plaintiff solely and exclusively in connection with this case and
5 for no other purpose;

6 c. A copy of this Order shall be kept with the protected
7 documents at all times;

8 d. Plaintiff may view the protected documents only for the
9 purpose of litigating this case, and a copy of the protected
10 documents shall not be provided to any other inmate or person
11 (other than Plaintiff's attorney should he retain one) for any
12 reason³;

13 e. Other than for use during this litigation, the
14 protected discovery will not be disclosed to anyone who is not
15 assigned to, or directly involved in, the preparation of
16 litigating this case;

17 f. If Plaintiff summarizes or discloses the protected
18 documents or its content in a court document of any kind, such
19 document will be filed under seal;

20 g. Within 30 days of the conclusion of this matter
21 (including appeal), Plaintiff will return the protected discovery
22 to the United States Attorney's Office for the Central District
23 of California, Civil Division; and
24

25
26 ³Plaintiff is currently on a writ to a Kentucky county jail;
27 thus, Defendant requests that these documents not be produced to
28 him until he returns to a Bureau of Prisons ("BOP") facility.

1 h. Any Plaintiff's counsel in this matter will be bound by
2 this protective order.

3 Defendant also requests that any video surveillance tape
4 discovered to be relevant in this matter be protected by Court
5 Order as well. Defendant requests that such video be provided to
6 Plaintiff only when he returns to a BOP facility so that the
7 video tape can be kept and maintained by a BOP staff member (to
8 be determined upon Plaintiff's return to a BOP facility).
9 Defendant requests that Plaintiff may only view the video upon
10 request to BOP staff and that Plaintiff only be allowed to view
11 the video tape on no more than two (2) occasions. Defendant also
12 requests that the proposed video be protected pursuant to the
13 same conditions as outlined in paragraphs a- h above.

14 **III. GOOD CAUSE EXISTS FOR A PROTECTIVE ORDER**

15 As set forth above, Plaintiff requests documents concerning
16 the alleged assault on him, including but not limited to, witness
17 interviews, video surveillance, and current post orders and
18 policies regarding the monitoring of units and metal detectors.
19 Such information regarding other inmates housed within the
20 federal prison system and security procedures in USP Victorville
21 impinge on the privacy rights of the inmates and pose a security
22 risk to these inmates as well as to USP Victorville which houses
23 high security inmates.

24 The Supreme Court has instructed that discovery "may
25 seriously implicate privacy interests of litigants and third
26 parties" and has specifically approved protective orders limiting
27 dissemination of such information. Seattle Times Co. v.
28

1 Rhinehart, 467 U.S. 20, 33, & n.19, 34 (1984). Because the
2 witness interviews requested contain names and other unique
3 identifiers of inmates, they are protected by the Privacy Act, 5
4 U.S.C. § 552a. While Privacy Act-protected records are
5 unquestionably discoverable if ordered by a court, the fact that
6 records are protected by the Privacy Act warrants consideration
7 of such "traditional devices as protective orders" to protect the
8 privacy interests underlying the Act. See, e.g., Laxalt v.
9 McClatchy, 809 F.3d 885, 889 (D.C. Cir. 1987). In the instant
10 case, without a protective order, the release of any inmates'
11 names would infringe upon their privacy rights.

12 In addition, "where otherwise discoverable information would
13 pose a threat to the safety and security of the prison or
14 infringe upon a protected privacy interest, a need may arise for
15 the Court to balance interests in determining whether disclosure
16 should occur." Fields v. Banuelos, 2012 WL 2888734 at *1 (E.D.
17 Cal. July 13, 2012); see also Garcia v. Clark, 2012 WL 1232315 at
18 *6 n. 5 (E.D. Cal. Apr. 12, 2012) (noting inmates entitlement to
19 inspect discoverable information can be accommodated in ways that
20 mitigate institutional safety); Robinson v. Adams, 2012 WL 912746
21 at *2-3 (E.D. Cal. Mar. 16, 2012) (issuing protective order
22 regarding documents containing information which implicated the
23 safety and security of the prison); Orr v. Hernandez, 2012 WL
24 761355 at *1-2 (E.D. Cal. Mar. 7, 2012) (discussing requests for
25 protective order and for redaction to minimize risk of safety and
26 security of inmates or the institution if released). Where, as
27 here, Plaintiff seeks current post orders and policies regarding
28

1 the monitoring of units and metal detectors at USP Victorville,
2 such information is highly sensitive given that current inmates
3 pass through these same metal detectors every day and any public
4 knowledge of such procedures and policies would greatly
5 jeopardize the security of the prison.

6 **IV. CONCLUSION**

7 For the foregoing reasons, Defendant respectfully requests a
8 protective order for the documents requested by Plaintiff, as
9 specifically detailed in Section II above.

10
11 DATED: August 28, 2012

Respectfully submitted,

12 ANDRÉ BIROTTE JR.
13 United States Attorney
14 LEON W. WEIDMAN
15 Assistant United States Attorney
16 Chief, Civil Division

17 /s/ Erika Johnson-Brooks
18 ERIKA JOHNSON-BROOKS
19 Assistant United States Attorney
20 Attorneys for Defendant
21
22
23
24
25
26
27
28